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Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA and PEACE AND FREEDOM PARTY, *et al.*,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA and CALIFORNIANS FOR AN OPEN PRIMARY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

GEORGE WATERS
Counsel of Record
LANCE H. OLSON
N. EUGENE HILL
OLSON, HAGEL, LEIDIGH, WATERS & FISHBURN
555 Capitol Mall, Suite 1425
Sacramento, CA 95814
(916) 442-2952

Attorneys for all Petitioners other than the California Republican Party

CHARLES H. BELL, JR.
BELL, MCANDREWS & HILTACHK
455 Capitol Mall, Suite 801
Sacramento, CA 95814
(916) 442-7757

Attorneys for Petitioner California Republican Party

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The briefs of the parties clearly frame the issue before this Court. The political party petitioners assert that the First Amendment protects their right to choose nominees who best represent each party's ideology and preferences, and that that right is obliterated by Proposition 198, which allows all voters, "regardless of political affiliation[,]" to cross party lines and to vote in several parties' primaries at the same election. *See* Cal. Elec. Code § 2151.[1]

On the other hand, the State sees the partisan primary as an election, not a nominating event, and thus claims wide latitude to regulate it. In the State's view, the blanket primary is a sort of mini general election designed to avoid "discrimat[ion] based on party affiliation[.]" Resp.Br. 11. The State sees few if any associational rights involved. Rather the partisan primary, like the election process as a whole, begins to look something like a laboratory experiment that can be fine tuned to produce officials who "stand closer to the median policy positions of their districts[.]" Resp.Br. 40.

What the State overlooks is that the winner of each party primary becomes "the *nominee* of that party at the ensuing general election." § 15451 (emphasis added). The State has no right to commandeer parties during the primary election and attempt to steer them toward median policy positions. The First Amendment protects the right of a political party to choose its own standard

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[1] Unless otherwise noted, all statutory citations are to the California Elections Code.

bearer, not somebody else's standard bearer. *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 224 (1989); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997). The First Amendment guarantees a party's right to choose a liberal standard bearer or a conservative standard bearer or any other kind of standard bearer it chooses. This is an area where "a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-124 (1981).

It is for this reason that Proposition 198 is unconstitutional. There is no doubt that Proposition 198 will flood California partisan primaries with voters who have no affiliation whatsoever with the party in whose primary they are voting. The presence of these voters will inevitably affect primary election results, the nature of the debate within the parties, and ultimately the parties' ideologies. This is the very objective of Proposition 198. This the State cannot do.

I. *TASHJIAN* CONTROLS THE RESULT HERE.

Respondents read *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) as recognizing the right of a political party to prevent "having the party's electoral base restricted contrary to the party's wishes." Resp.Br. 21. From this perspective, the right of political association becomes a one-way ratchet that protects a party's right to invite non-members to join in the nomination process, but does not protect a party's right to limit the nomination process to its own members.

Respondents misread *Tashjian*. The specific result in *Tashjian* was that a closed primary statute was held invalid as applied to a political party that sought to open its primary election to independents. But that result was based on a principle, the principle that "the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' " *Id.* at 214 (quoting *La Follette, supra*, 450 U.S. at 122). *Tashjian* made clear that this principle applies full bore when a party performs the "basic function" of choosing its nominees. *Id.* at 216. It is this principle that petitioners rely on in the present proceeding. Petitioners do not claim "unfettered control over who can vote in primary elections[.]" Resp.Br. at 19. Rather they assert that the associational right asserted here is stronger than that asserted in *Tashjian*, and the burden imposed by Proposition 198 is greater than the burden considered in *Tashjian*.

II. PROPOSITION 198 SEVERELY BURDENS PARTY ASSOCIATIONAL RIGHTS.

As petitioners set out in their opening brief, Proposition 198 severely burdens the associational rights of political parties by forcing them to accept "nominees" who are supported by neither a majority nor a plurality of party members. Pet.Br. at 27-33. Proposition 198 is designed to make crossover voting effortless and to give non-party members an equal role in choosing party nominees. This strikes at the very heart of the First Amendment, which protects the right of a political party to choose *its own* nominees. *Eu, supra*, 489 U.S. at 224; *Timmons, supra*, 520 U.S. at 359.

Respondents' Brief offers several arguments why Proposition 198 does not severely burden the parties, and therefore does not trigger strict scrutiny. None of these arguments has merit.

First, respondents contend that the harm inflicted by the blanket primary will be insubstantial because 90 to 95 percent of crossover voters are "sincere"[2] and because crossover voting "generally does not change the outcome of elections[.]" Resp.Br. at 27-31. Even if this were true (which petitioners dispute), it misses the point. The First Amendment protects the right of a political party to choose its own nominees. The motivation of outsiders who wish to join in the nominating process is irrelevant. Even "sincere" crossover voters have different preferences from party members and therefore will skew the results in an unknown number of nominating elections. Pl.Ex. 8 [Tables 1 and 3 of Addendum to Field Report].

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[2] While the issue is not relevant to the resolution of this case, the Court should be aware that there is considerable debate over what percentage of crossover voters are "sincere." It is true that one of the political parties' experts estimated that 90-95 percent of crossover voters vote for a "preferred" candidate. Pl.Ex. 7, p. 7 [Costantini Report]. However the State's expert on crossover voting estimated that among crossover voters in the 1988 Super Tuesday presidential primaries, about 30% were "true supporters" of the candidate they voted for, and the remaining 70% participated in some form of strategic voting. Def.Ex. H, pp. 24-27 [Nagler Report]. This wide variation is not an indication that anyone is dishonest or incompetent. Rather it is a result of the fact that none of the experts who testified at trial conducted original survey research; all were forced to interpret studies conducted by third parties, and those studies do not use consistent definitions of terms such as "true supporter," "preferred," and "sincere."

The very fact that Mervin Field, the leading poll taker in California, now surveys *all* voters to determine who will win party primaries, drives home this point. Pl.Ex. 8 [Addendum to Field Report]. Poll takers would not sample non-party members if it were not clear that the preferences of non-party members will significantly affect the results of primary elections. The State cannot claim that Proposition 198 will produce officials who "stand closer to the median policy positions of their districts than do those elected under closed primaries" and simultaneously deny that Proposition 198 will significantly affect the results of primary elections. Resp.Br. at 40.

Post-trial events further illustrate the effect of Proposition 198 on primary elections. As one example, California's March 7, 2000 Republican presidential primary pitted George Bush against John McCain. Separate tallies were kept of the results of that primary: one tally recorded the preference of Republican voters only, a second tally recorded the preference of non-Republicans voting in that primary. The results show that among Republican voters only, Mr. Bush beat Mr. McCain by more than 700,000 votes. Respondents' Second Lodging at 13. Among crossover voters, Mr. McCain beat Mr. Bush by a margin of 340,000 votes. Approximately 31% of the votes cast in the Republican primary were cast by non-Republicans. *Ibid*. While the difference in voting in that particular race was not outcome determinative, the enormous numbers of crossover votes in that race belies any argument that petitioners' concerns over the effects of crossover voting are "overdrawn." Resp.Br. at 27.

As a second example, recently-completed vote recounts in two Southern California races demonstrate

that crossover votes did, in fact, change the results of two Republican Assembly races in the 2000 primary.[3] *See Recounts Clinch GOP Suspicions*, Los Angeles Times, Orange County Edition, April 11, 2000, at B4; *Analysis proves point for open-primary foes*, Orange County Register, April 11, 2000, at B7. In both cases, one candidate was favored by the majority of voters in his party, but a large number of nonparty voters caused another candidate to be selected as the nominee of that party. Whether this was the result of "sincere" or "strategic" voting, the fact remains that the party members of those districts lost the ability to select their own nominee.

Second, the State argues that both open and closed primary systems allow some crossover voting, and that a decision invalidating Proposition 198 would inevitably lead to the invalidation of those systems as well. Resp.Br. at 31-33. Here the State paints with much too broad a brush.

No one would dispute that the American treatment of political parties is unique and that American political parties are among the most regulated in the world.[4] State

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[3] Petitioners' experts testified that crossover voting, particularly strategic crossover voting, was most likely to occur in low-profile Assembly races. R.T. 361 [Cain]; Pl.Ex. 7, p. 8 [Costantini].

[4] *See* L. Epstein, *Political Parties in the American Mold* (Wisconsin Press 1986), 156-157: "Generally . . . parties outside of the United States do not purchase the privilege of ballot access by surrendering control of their label bestowal to a government-conducted election or even to an election or other process closely supervised by governmental authority. Nor are these parties ordinarily subject to most of the other legal

laws requiring political parties to choose their nominees by direct primary election became common in the beginning of the Twentieth Century.[5] Once the States began conducting primary nomination elections, the States necessarily became involved in supervising the conduct of those elections. In particular, the States began to regulate who could vote in party primaries. But the original justification for that regulation was to ensure that the nominees of the parties were elected in a fair and impartial manner *by the members of the party*. *See Socialist Party v. Uhl*, 155 Cal. 776, 793, 103 P. 181 (1909) ("If the indiscriminate right to vote with any party at a primary were given to electors, whether they were in accord with the principles of the party or not, it would soon tend to destroy all party organization").

As the State notes, some level of crossover voting is possible in any primary election scheme. Even in a closed primary system, voters can cheat – they can register with a party with which they do not affiliate. 984 F.Supp. at 1298, fn. 25; Pet.App. 72a. And in an open primary system, where voters can choose the ballot of any party, voters can choose to vote the ballot of a party they do not

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regulations imposed on the internal affairs of American parties."

[5] In *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court held that "It is too plain for argument . . . that the State . . . may insist that intraparty competition be settled before the general election by primary election or by party convention." *Id.* at 781; *see also Lightfoot v. Eu*, 964 F.2d 865, 872-873 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) (upholding California statute that requires political parties to nominate by primary election).

favor. But the fact that any direct primary system will have some impact on party associational rights does not allow the State to structure a primary system that maximizes that impact. Proposition 198 is designed to make crossover voting painless and to invite the entire electorate to join in choosing party "nominees."[6] A constitution that holds that "[t]he *independent* expression of a political party's views is 'core' First Amendment activity" does not permit California to force upon a party a nominating procedure that robs it of that independence. *See Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 616 (1996) (emphasis added).

Third, the State argues that Proposition 198 does not burden the parties' traditional activities. Resp.Br. at 33-36. This argument is wholly based on the State's characterization of "traditional activities." The traditional activity that the political parties wish to engage in is the nomination of candidates who best represent each party's ideology and preferences, and it is that activity that is severely burdened by Proposition 198.

Fourth, the State argues that the parties can avoid the effect of Proposition 198 completely by using California's independent nomination procedure to place candidates directly on the general election ballot. Resp.Br. at 38. This is wholly unrealistic. An independent candidate must disaffiliate from all political parties at least 13 months

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[6] Proposition 198 dramatically reduces the cost of strategic voting. All other forms of primaries require voters to declare at some point which party primary they wish to participate in. In these other systems, a crossover voter forfeits the right to vote in his or her own party primary. J.A. 61 [Cain Report].

before the general election. § 8550(f); *see Storer v. Brown*, 415 U.S. 714, 735 (1974) (California disaffiliation statute "protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot"). Even if, e.g., the Libertarian Party had the foresight to have a number of candidates disaffiliate from the party 13 months before the general election, those candidates would appear on the general election ballot not as Libertarians but as independents, and would run against Libertarian "nominees" chosen through the blanket primary. This is not a viable solution; it is a recipe for political suicide.

III. PROPOSITION 198 PARTICULARLY BURDENS THE MINOR PARTIES, WHO DO NOT SEEK TO PURSUE "MEDIAN POLICY POSITIONS."

The District Court concluded that the major parties "have been characterized by a fluidity and overlap of philosophy and membership" and at different times have been "composed of various elements reflecting most of the American political spectrum." 986 F.Supp. at 1296; Pet.App. 65a-66a; quoting *La Follette, supra*, 450 U.S. at 133 (Powell, J., dissenting). Leaving aside the question whether this is an accurate characterization of the major parties, it is certainly not an accurate characterization of the minor parties. The Libertarian Party and the Peace and Freedom Party have distinct ideologies at opposite ends of the political spectrum. Compare J.A. 76-79 [Libertarian Party Statement of Principles] with J.A. 82-83 [Peace and Freedom Party 1996 Platform]. They have no desire to be moved back to the middle of the spectrum.

They are at the greatest risk that the "inclusion of persons unaffiliated" with them will "seriously distort" their collective decisions. *See La Follette, supra,* 450 U.S. at 122.

The State suggests that the minor parties use the primary ballot only for "expressive purposes." Resp.Br. 36. This is nonsense. The minor parties use the primary to choose the nominees who will best represent them at the ensuing general election. Their only expressive purpose is to make sure that the nominees – who will be described on the general election ballot by the labels "Libertarian" or "Peace and Freedom" – are really chosen by the Libertarian and Peace and Freedom parties.[7] The State also suggests that the impact of Proposition 198 on the minor parties is lessened because few minor party primaries are contested.[8] Resp.Br. 37. But the frequency with which an event occurs has no relationship to its importance or to the extent of the constitutional protection that attaches to it. It is reasonable to assume that minor party contested primaries occur when there are serious differences of opinion within the party. The selection of a nominee is the mechanism by which such disputes are resolved. This is precisely the situation in which the freedom of association is most important.

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[7] The party label is "one of the most important pieces of information that a voter can have about candidates and their likely actions in office." J.A. 57 [Cain Report].

[8] Petitioners' opening brief identified three 1998 primary races where the number of nonparty voters in contested minor party primaries exceeded total party registration. Pet.Br. 36-37.

IV. PROPOSITION 198 IS NOT NARROWLY TAILORED TO ADVANCE A COMPELLING STATE INTEREST.

The State now asserts that Proposition 198 advances seven compelling state interests, an increase of two over the number claimed in the Court of Appeals. We will briefly address the two new interests.

Affording voters more choice. On a purely quantitative level, a blanket primary increases the number of candidates a voter can choose from in a primary election. But in California the partisan primary is a nominating event. The State has no compelling interest in allowing nonparty members to choose party nominees. The State's power to regulate elections and set voter qualifications must be exercised without infringing upon "basic constitutional protections." *Kusper v. Pontikes,* 414 U.S. 51, 57 (1973).

Any primary election system narrows the range of available candidates. A partisan primary does this in a particular way – it allows an unlimited number of candidates to compete for party nominations, but each party may only advance one candidate to the general election. The electorate is then presented with a range of candidates who represent the ideological spectrum of the parties participating in the process. To the extent that Proposition 198 produces more centrist candidates, voters will be presented with fewer choices from a narrow ideological range. J.A. 70-71 [Cain Report].

Promoting "fairness." This is a predictive judgment that is not susceptible to proof. It can just as easily be argued that Proposition 198 promotes "unfairness"

because it produces "nominees" who are not supported by the party they "represent."

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

GEORGE WATERS
Counsel of Record
LANCE H. OLSON
N. EUGENE HILL
OLSON, HAGEL, LEIDIGH, WATERS & FISHBURN
555 Capitol Mall, Suite 1425
Sacramento, CA 95814
(916) 442-2952

Attorneys for all Petitioners other than the California Republican Party

CHARLES H. BELL, JR.
BELL, MCANDREWS & HILTACHK
455 Capitol Mall, Suite 801
Sacramento, CA 95814
(916) 442-7757

Attorneys for Petitioner California Republican Party